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No. 1086

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

KENNETH W. DAY, ET AL., *Appellants,*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and SOUTHERN PACIFIC COMPANY, *Appellees.*

On Appeal From the United States District Court for the Southern District of California, Central Division

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ANSWER OF APPELLANTS TO MOTIONS OF APPELLEES TO AFFIRM

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The appellants, Kenneth W. Day, et al., pursuant to Rule 16(3)[1] of the Rules of this Court, submit the fol-

[1] The joint motion of the United States and of the ICC was received by the appellants on April 2, 1966. The motion of the Southern Pacific Company was received on April 18, 1966.

lowing answer in opposition to the motions of the appellees United States, Interstate Commerce Commission, and Southern Pacific Company to affirm the judgment below.[2]

1. Constitutional Questions

The joint motion of the United States and of the ICC (page 6) contends that no substantial question as to the constitutional rights of the appellants and the employees they represent is presented because they received the essentials of a fair hearing. However, the "hearing" to which the joint motion refers was nothing more than a consideration of the application for approval of the Southern Pacific-Pacific Electric merger and the reasons advanced therein for its approval without any exploration of their validity and, in particular, without weighing the interests of the employees affected, as required by Section 5(2)(c) of the Interstate Commerce Act, or without consideration of any evidence as to whether the protective conditions imposed were in fact the equitable arrangements required by Section 5(2)(f) of the statute.

The Southern Pacific motion contends (pages 12, 13) that the Commission, in fact, did weigh the interests of the employees affected. However, counsel for the Commission, in the hearing before the District Court, conceded that the Commission did not do so (Jurisdictional Statement, pages 17, 18). The joint motion of the United States and the ICC seeks to glide

[2] The joint motion of the United States and of the ICC (page 2) incorrectly states that appellants are the Railway Labor Executives' Association and employees of the Pacific Electric Railway. The appellants also include the International Association of Machinists and the Brotherhood of Locomotive Engineers, not affiliated with the Association.

over this point by citing the requirements of Section 5(2)(c) and then stating (page 5) that "To this end, as a condition of its approval of a merger, the Commission must 'require a fair and equitable arrangement' to protect the employees", thus obliquely endorsing the position of the Commission's counsel before the District Court that the Commission has met its obligations when it considers employee protection under Section 5(2)(f).[3] However, it is clear that the Commission does not discharge its obligations to employees merely by considering and acting on employee protective conditions, but that it has a further obligation, as it has always recognized and as the statute makes clear, of weighing their interests on the issue of whether or not the transaction should be approved, i.e. whether it is consistent with the public interest (Jurisdictional Statement, pages 18-20).

Moreover, the Commission did not, in fact, give proper consideration to the issue of protective conditions under Section 5(2) because, as a result of its failure to conduct a hearing, it had no facts before it with respect to the impact of the transaction on employees (Transcript of Proceedings, page 28). The appellants do not perceive how it is possible to meet the requirements of Section 5(2)(f) without such facts.

Both motions to affirm contend that the employees were given ample opportunity by the Commission to direct attention to any facts and issues which should be explored in a hearing and that they failed to present any particulars. However, this argument attempts to

[3] Counsel for the United States in the hearing stated that "The Government doesn't intend to take a position in this case. Therefore, I wonder if I could be excused?" (See page 5 of Transcript of Proceedings.)

place the burden on the employees of coming forward with facts which were wholly within the possession of the merger applicants and which were not divulged by their application as is ordinarily the case (Jurisdictional Statement, pages 13-15). The Commission had the duty to determine these facts and it did not discharge this duty. As its counsel admitted to the District Court, there was nothing before the Commission to show the impact on employees (Transcript of Proceedings, page 29).

It is respectfully submitted that the denial of an evidentiary hearing to the appellants under these circumstances constitutes a travesty on the concept of fair play and gives rise to a substantial constitutional issue. In constrast, the Commission only recently on the application of the Southern Railway set down for rehearing the determination of the scope of employee protective conditions that should be imposed on the Southern's long since approved acquisition of control of the Central of Georgia, and thus will rehear the very conditions which it imposed in the present case.

2. Statutory Questions

Both motions to affirm rely on the grant of authority of the Interstate Commerce Commission under Section 5(2)(b) to dispense with public hearings on railroad merger applications upon a finding that such a hearing is not in the public interest. This Court has yet to determine the scope of the Commission's authority under that provision (Jurisdictional Statement, page 16). It was never intended to be used as an escape valve to avoid the obligations of Sections 5(2)(c) and 5(2)(f) as it was used in the present case. Moreover, prior to this case it was never used by the Commission

to dispense with a hearing on a railroad merger case where such a hearing had been requested.

The Southern Pacific motion (page 7) argues that the Commission on numerous occasions has decided similar merger cases without a hearing. In none of the cited cases did the Commission deny a request of the employees for a hearing.[4] In prior proceedings where representatives of the employees have requested a hearing and this was the only request made, the Commission has granted the hearing. See: *Sacramento Northern Railway Trustees Abandonment*, 299 I.C.C. 73; *Chicago, St. Paul, Milwaukee & Omaha Ry. Co. Lease*, 295 I.C.C. 441.

[4] The joint motion of the United States and the ICC (page 4) and the motion of the Southern Pacific Company (page 2) state that the employee representative, the Railway Labor Executives' Association, did not formally intervene in the merger proceedings as required by the Commission's Rules of Practice in spite of the fact that the Commission did not rely upon this point before the District Court and in spite of the further fact that Section 1.40(b) of the Commission's Rules do not require a petition to intervene to be filed prior to the time a proceeding is called for hearing and further provides that "failure to file a protest shall not prejudice subsequent participation in the proceeding". Moreover, the communications between the Association and the Commission were accepted by the Commission. They also show on their face that they were in accord with a well established procedure and that they were served on the carriers involved.

CONCLUSION

The appellants submit that the jurisdictional statement presents substantial questions for this Court's consideration.

Respectfully submitted,

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